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Punitive Damages Against Fiduciaries: Leaving *Hoppe* Behind and Allowing Punitive Damages Where Equitable Relief Is Sought, *Part I*

A majority of Florida courts have followed a rule that prohibits the award of punitive damages in cases in which plaintiff seeks equitable relief (the traditional rule).[1] Although arguments for the traditional rule have been soundly refuted,[2] Florida courts continue to rely on authority that, as argued below, should no longer be regarded as good law.[3] Courts refusing to award punitive damages frequently cite a historical distinction between law and equity courts (and legal and equitable causes) that is no longer valid and that has been rejected in favor of a more modern rule.[4] Some Florida courts, recognizing a modern trend,[5] have adopted a rule permitting punitive damages to be awarded even when a plaintiff seeks relief in equity (the modern rule).[6] The adoption of the modern rule has created a split in the Florida courts.[7] This article's thesis is that Florida should expressly adopt the modern rule to resolve the current split. This article is being published in two parts, the second coming out next month. In Part I, the authors consider Florida law, including the adoption of the modern rule by the Fourth District Court of Appeal. In Part II (to be published next month), the authors explain why they believe the traditional rule is wrong and conclude that punitive damages have been, are, and should be available for actions traditionally cognizable in equity, particularly in the fiduciary or probate setting.

Hoppe and the No Punitive Damages Rule

In the probate division, counsel arguing against the availability of punitive damages typically cite a line of cases that adheres to the traditional rule, *i.e.*, *Hoppe v. Hoppe,* 370 So. 2d 374 (Fla. 4th DCA 1978), *Santos v. Bogh*, 298 So. 2d 460 (Fla. 3d DCA 1974), *Lee v. Watsco, Inc.*, 263 So. 2d 241 (Fla. 3d DCA 1972), and *RC #17 Corp. v. Korenblit*, 207 So. 2d 296 (Fla. 3d DCA 1968). These decisions hold that absent statutory authority, a judge sitting as a trier of fact in an action formally cognizable in equity may not award punitive relief.[8] None, however, present any significant discussion of the traditional rule's rationale nor any response to the arguments cited by modern rule courts that expressly reject the traditional rule.

In *Hoppe,* for example, the court merely stated, "the law is clear in Florida that absent a statutory authority, a judge sitting as a trier of fact in an action formally cognizable in equity may not award punitive damages."[9] In *Insurance Field Services, Inc. v. White & White Inspection and Audit Service, Inc.*, 384 So. 2d 303 (Fla. 5th DCA 1980), the appeal court cited *Hoppe* and the traditional rule to deny a punitive claim,[10] but provided no further analysis.[11] In *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425 (Fla. 5th DCA 1985), *rev. den.*, 488 So. 2d 830 (Fla. 1986), the court, citing the traditional rule and *Hoppe*, held punitive damages unavailable again without further analysis.[12] The case in which the traditional rule was announced as Florida law, *Orkin Exterminating Co. v. Truly Nolen, Inc.*, 117 So. 2d 419, 422 (Fla. 3d DCA 1960), *rev. den.*, 120 So. 2d 619 (Fla. 1960), however, does provide a fairly detailed rationale.

Orkin Exterminating — Florida Adopts the Traditional Rule

In *Orkin*, the question was whether it would be error for a court of equity to grant punitive damages absent statutory authorization.[13] The *Orkin* court cited a number of appellate courts that appeared by implication to have allowed punitive damages to be awarded by a chancellor,[14] but concluded they had not addressed the precise issue and, thus, that Florida had not decided whether punitive damages were available in cases in which plaintiff sought equitable relief.[15] It began its analysis as follows:

> A historical background of the question of whether an equity court has the power to award punitive damages is ably set forth in *Superior Construction Co. v. Elmo*, 204 Md. 1, 102 A.2d 739, 104 A.2d 581, 48 A.L.R.2d 932, 947. A review of the authorities therein set out reveals that punitive damages originated in the law of England where *the common conscience of the jury was the basis for the award of the additional amount beyond compensatory damages to the injured party*. The weight of authority in this country is definitely against the right of a chancellor to award punitive damages in the absence of express statutory authority to do so.[16]

The *Orkin* court noted that denial to a chancellor of the right to award punitive damages was supported by two theories: first, a waiver theory that holds that by bringing the action in equity, plaintiff waives the right to punitive damages, and, second, that awarding punitive damages is incompatible with equitable principles.[17] The latter theory, the court noted, is frequently articulated as the view that "a court of equity is not an instrument for the punishment of an individual or for the exacting of vengeance."[18]

The court explained that decisions following the traditional rule reflect two important intuitions: first, that any different holding would deprive the defendant of his or her constitutional right

to a jury trial before punishment; and, second, if plaintiff has a right to punitive damages, he or she has an adequate remedy at law and could have brought the case at law, but elected not to do so, thus, waiving rights he or she would have had in a law court.[19] It then observed that it was difficult to set boundaries on the amount allowed as punitive damages and that in law actions for damages, the amount is limited by the common conscience expressed through the jury system. Restrictions against private punishment and the jury's ability to best determine the proper quantum of damages to punish are the support for traditional rule. The *Orkin* court thus held: "It is not intimated that a chancellor has less of this inherent sense of justice, but his judgment is the judgment of one man and that of the jury is the judgment of many. The right to assess a punitive fine for civil wrongs is best left to the jury."[20]

Glusman v. Lieberman — Florida Adopts the Modern Rule

Notwithstanding *Orkin*, other Florida courts have permitted punitive claims where equitable relief has been sought,[21] including *Glusman v. Lieberman*, 285 So. 2d 29 (Fla. 4th DCA 1973), rejecting the authorities upon which *Hoppe* relied, including *Orkin*.[22] The *Glusman* complaint sought damages for slander of title (a law action) and to quiet title (an action in equity) and the court began by stating that the rule announced in *Orkin* "is no longer appropriate in Florida."[23] The parties waived their right to a jury trial with regard to the law action and the entire matter was tried by the court. The court raised the following question:

> What rational basis is there to hold at this point and time that the trial judge could not try the damage question in its entirety and also grant the requested equitable relief? Granted that under the law of England, as pointed out in *Orkin*, *supra*, punitive damages were not assessible by a chancellor in equity, but *with the demise of the two sides of the circuit court, equity and law, and the adoption of Rule 1.040 RCP, 30 F.S.A., establishing one form of action, and Rule 1.110(g) RCP, allowing the joinder of legal and equitable claims, the reason for the rule has vanished.* As pointed out in *Emery v. International Glass & Mfg., Inc.*, Fla. App. 1971, 249 So. 2d 496:
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> "But withal, *the essential purpose of the new merger rule is to facilitate the administration of justice and to pave the way for a claimant to receive appropriate judicial relief unfettered by the technical distinction between the two procedural hats formerly worn by the same court*. Accordingly, in line with this purpose there is no longer provision in the rules for the transfer of any cause to the opposite side of the circuit court; hence a cause now properly before the circuit court is before it for all purposes notwithstanding that *there is an admixture of claims and/or defenses which substantively may sound both in law and in equity*. Further, in line with the essential purpose of the rule, it would now be incongruous to hold that after a full and complete final hearing a cause properly before a court should be halted and begun anew on another substantive theory. The court should at once be free to do equity on the one hand and, on the other, preserve the rights at law of the parties, including the right to jury trial if timely applied for. Colloquially stated, the court ought to clean up the whole ball of wax in the straightest line possible, utilizing just so much of the existing rules as may be necessary to get to the heart of the matter."[24]

The court then explained that even though the weight of authority might still support the traditional rule, the "more enlightened view, considering the aforementioned changes in the Rules of Civil Procedure," is stated in cases like *I.H.P. Corp. v. 210 Central Park South Corp.*, 16 App. Div. 2d 461, 228 N.Y.S.2d 883 (1st Dep't 1962), *aff'd,* 189 N.E.2d 812 N.Y. (1963), which permits punitive damages in cases seeking equitable relief. *I.H.P.*, in a detailed ruling discussed below, rejected the historic procedural separation between law and equity as a basis for denying punitive damages to plaintiffs seeking equitable relief. It cited as a rationale modern code practice that abolished the ancient forms of action which removed "outmoded procedural barriers" against awarding complete relief in a single action.[25]

Citing agreement with *I.H.P.*'s arguments, *Glusman* rejected Florida authorities that adopted the traditional rule and held that where a judge sits as the trier of fact in a case involving legal and equitable claims, compensatory and punitive damages as well as any appropriate equitable relief may be awarded. Noting that its holding was contrary to *R.S. #17 Corp. v. Korenblit*, it held that feature of the holding in *Korenblit* was incorrect, as noted in the dissent in that case.[26] *I.H.P.* has been referred to as the "seminal case" on the issue of award of punitive damages by equity courts.[27] Because *Glusman* relied so heavily on *I.H.P*, we discuss it, here, in more detail.

I.H.P. Corp. v. 210 Central Park South Corp.

I.H.P. was an action for injunction, tried without a jury, which resulted in a punitive award. New York's Appellate Division, First Department, began its analysis by noting that most New York cases had precluded punitive awards in which equitable relief was sought, for reasons rooted in the historical, procedural separation between law and equity.[28] Although abolition of the ancient forms of action had not eliminated legal and equitable principles separately governing judicial remedies, the court observed that it did remove "outmoded procedural barriers against awarding complete relief in a single action."[29] Concluding that prior cases had not adequately explored the rationale for the rule,[30] and that authorities were in conflict,[31] the *I.H.P.* court then discussed the arguments for the traditional rule, rejecting each of them.

First, the court rejected the argument that a court of equity lacks the power to award punitive damages. That view, it held, presupposed courts still sat separately in law and equity, which was no longer the case in New York. In addition, where proof only established a legal remedy, the legal remedy could be granted even if equitable relief was not warranted.[32] Second, the court rejected the argument that punitive damages are incompatible with equitable principles referring to that position as an "outgrowth of the procedural separation rather than as an independent substantive rule."[33] By assuming equity could grant all appropriate relief, the traditional rule prevented issuance of punitive damages by a law court:

> [T]he consequence last discussed is governed by procedural forms rather than reason or principle. It is one thing to deny legal relief in a court of equity. *It is quite another for the equity side of the court to reach across the invisible line and forbid the law side to grant a legal remedy to which a party is otherwise unquestionably entitled.* To do so would presuppose that the traditional equitable remedies — in this case, an injunction and ancillary compensatory damages — will invariably afford complete relief. Such approach, however, would run counter to another equitable principle, of equal standing, that equity will mold its decrees to suit the needs of the particular case. Thus, while tradition and precedent might forbid the Chancellor, as such, from awarding punitive damages, an equally strong tradition would bar any unqualified rule that customary forms of

equitable relief will invariably be adequate and will always preclude accepted forms of legal relief. Such inflexibility has never been characteristic of equity jurisprudence.[34]

It was clear from the equitable forms of relief, the court noted, that they might not always suffice as a substitute for a punitive award. When a sanction would not be as effective as a punitive award to deter malicious conduct,[35] a result offensive to equity and inconsistent with the noncontroversial scope of the law court's authority, there was no sound basis to preclude the punitive award.

Third, *I.H.P.* rejected the argument that by suing for equitable relief, the aggrieved party waives all claims to punitive damages, referring to it as the "least substantial of the attempted justifications." The court explained:

In the absence of words or conduct by a party which manifest an intention to waive any of his remedies, it merely begs the question to hold that a waiver has resulted from a mere asking for equitable relief. A party cannot reasonably be deemed to have waived a remedy unless he seeks others, knowing they are exclusive. But whether they are exclusive is the very issue to be here resolved. Nor is there any good reason, except that of historical accident, why one should be compelled to elect between two inadequate remedies.[36]

I.H.P. rejected the traditional rule as based on no longer valid, anachronistic historical distinctions:

[T]he rule which forbids combination of equitable relief with an award of punitive damages is founded upon an obsolete procedural division with no rational basis, apart from history, in modern substantive law or equity. If the facts warrant, it may be entirely appropriate to grant an injunction or another form of equitable relief and also exact punitive damages as a deterrent against flagrantly unlawful conduct, whether embraced within an injunction or not. Such freedom to grant whatever judicial relief the facts call for is entirely consonant with substantive legal and equitable principles and with present-day concepts of procedural efficiency. In this very context there may be found jurisdictions in which the broader view has been taken.[37]

The *I.H.P.* court then overruled contrary authority holding:

The courts which take the broader view reflect a realistic assessment of procedure as subordinate to the achievement of the just result in modern substantive law. This Court should now do no less. To the extent that this Court's holding in *Dunkel v. McDonald* (272 App. Div. 267, 70 N.Y.S.2d 653, *affd.*, 298 N.Y. 586, 81 N.E.2d 323, *supra*) is to the contrary, it should be overruled.[38]

Although the *I.H.P.* court recognized that the right to a jury trial of legal causes continues to be valid, it noted this fact would ordinarily not pose any practical difficulty because causes could be readily tried at the same time.

In next month's issue, the authors shall explore why punitive damages should be available for matters traditionally cognizable in equity, particularly in the fiduciary context.❑

[1] *See Orkin Exterm. Co. v. Truly Nolen, Inc.*, 117 So. 2d 419, 422 (Fla. 3d D.C.A. 1960), *rev. den.*, 120 So. 2d 619 (Fla. 1960); *Recent Developments, Punitive Damages Held Recoverable in Action for Equitable Relief*, COLUMBIA L. REV. at 175, 176 -79 (1963).

[2] *See Recent Developments, Punitive Damages Held Recoverable in Action for Equitable Relief*, COLUMBIA L. REV. at 176-79; *I.H.P. Corp. v. 210 Central Park South Corp.*, 166 A.D.2d 461, 463-65, 228 N.Y.S.2d 885, 886 (1st Dep't 1962).

[3] A number of courts that once adopted the traditional rule have been expressly overruled. *See, e.g., Dunkel v. McDonald*, 272 App. Div. 267, 272, 70 N.Y.S.2d 653 (1st Dep't 1947), *aff'd on other grounds*, 298 N.Y. 586, 81 N.E.2d 323 (1948), *expressly overruled by I.H.P.*, 166 A.D.2d at 463-65, 228 N.Y.S.2d at 886 (equity court may award punitive damages as a result of merger of law and equity courts, expressly overruling *Dunkel* and providing comprehensive rationale for rejecting traditional rule).

[4] *See infra* discussion Part I and notes 8-21 and accompanying text. *See generally Black v. Gardner*, 320 N.W.2d 153, 160 (South Dakota 1982); *Madrid v. Marquez*, 131 N.M. 132, 33 P.3d 683, 686 (N.M. App. 2001); Jay M. Zitter, *Punitive Damages: Power of Equity Court to Award*, 58 A.L.R. 4th 844, text at notes 3, 4, 5 (2009).

[5] *See generally Black*, 320 N.W.2d at 160 (discussing modern trend); *Madrid*, 33 P.3d at 686 (same).

[6] *Glusman v. Lieberman*, 285 So. 2d 29 (Fla. 4th D.C.A. 1973); *Sussman v. Schuyler*, 328 So. 2d 30, 32 (Fla. 3d D.C.A. 1976).

[7] *See* 6 FLA. PRACTICE SERIES TM, Ch. 15, Punitive Damages, Part II, Establishing Liability, §15:6 Prerequisites for Punitive Damage Awards, Sub. B, text at notes 21-22 (2009-2010 ed.) (hereinafter "Punitive Damages") (discussing split).

[8] *Hoppe v. Hoppe*, 370 So. 2d 374, 376 (Fla. 4th D.C.A. 1978) (citing *Santos v. Bogh*, 298 So. 2d 460 (Fla. 3d D.C.A. 1974), *Lee v. Watsco, Inc.*, 263 So. 2d 241 (Fla. 3d D.C.A. 1972), *RC #17 Corp. v. Korenblit*, 207 So. 2d 296 (Fla. 3d D.C.A. 1968)).

[9] *Hoppe*, 370 So. 2d at 375 (citing *Santos*, *Lee*, and *RC #17 Corp.*).

[10] *Insurance Field Services,* 384 So. 2d at 308.

[11] *Id.*

[12] The authorities cited were *Santos*; *RC #17 Corp.*; *Orkin Exterm. Co. v. Truly Nolen, Inc.*, 117 So. 2d 419, 427 (Fla. 3d D.C.A. 1960), *rev. den.*, 120 So. 2d 619 (Fla. 1960).

[13] *Orkin Exterminating*, 117 So. 2d at 421-22.

[14] Specifically, he cited *Florida Ventilated Awning Co. v. Dickson*, 67 So. 2d 215 (Fla. 1953); *Fontainebleau Hotel Corp. v. Kaplan*, 108 So. 2d 503 (Fla. 3d D.C.A. 1959), *rehearing denied* Feb. 13, 1959; *Miami Beach Lerner Shops, Inc. v. Walco Mfg. of Florida*, 106 So. 2d 233 (Fla. 3d D.C.A. 1958).

[15] *Orkin Exterminating*, 117 So. 2d at 422.

[16] *Id.* at 422 (emphasis added) (citing cases).

[17] *Id.*

[18] *Id. See generally* Zitter, *Punitive Damages: Power of Equity Court to Award*, 58 A.L.R. 4th 844, at §2 (2009).

[19] *Id.* at 422.

[20] *Id.* at 423.

[21] *See, e.g., LoCascio v. Sharpe*, 23 So. 3d 1209 (Fla. 3d D.C.A. 2009), *rehearing den.*, Jan. 12, 2000, 2009 WL 3448111 at * 1 (Fla. 3d D.C.A. Oct. 28, 2009); *Chemplex Florida v. Norelli*, 790 So. 2d 547 (Fla. 4th D.C.A. 2001). *Accord Balzebre v. 2600 Douglas Inc.*, 291 So. 2d 32 (Fla. 3d D.C.A. 1974); *Wasman v. Goshgarian*, 537 So. 2d 1026 (Fla. 3d D.C.A. 1989).

[22] *See generally Hoppe*, 370 So. 2d 374 (Fla. 4th D.C.A. 1978), *cert. den.* (Fla. 1978).

[23] *Id.*

[24] *Id.* (emphasis added).

[25] *I.H.P.* is discussed *infra* notes 28-38 and accompanying text.

[26] *Glusman*, 285 So. 2d at 31.

[27] *White v. Rudity's*, 117 Wis.2d 130, 140, 343 N.W.2d 421, 425 (Wis. App. 1983).

[28] *I.H.P.*, 16 App. Div. 2d at 463.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 463-64.

[32] *Id.* at 464.

[33] *Id.*

[34] *Id.* at 465 (emphasis added).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 465-66 (citing cases).

[38] *Id.* at 466.

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This column is submitted on behalf of the Trial Lawyers Section, Clifford C. Higby, chair, and D. Matthew Allen, editor.